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Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

JACK H. HALFEN, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Jack H. Halfen, Petitioner here, prays that a writ of certiorari issue to review the judgment entered in this case on the 30th day of March, 1955, by the United States Court of Appeals for the Fifth Circuit.

OPINION

The opinion of the Court of Appeals is reported in 220 F (2), p. 440. A copy of the opinion of the Court of Appeals is attached (Appendix p. 6), and a copy of the opinion may be found in Transcript of Record at page 25.

JURISDICTION

The judgment below was entered on the 30th day of March, 1955, and petition for rehearing was denied on the

9th day of May, 1955. The jurisdiction of this Court is invoked under Sec. 1254 (1) of Title 28 of the U. S. Code, entitled "Judicial Code and Judiciary," Act approved June 28, 1948, effective September 1, 1948. This action involves conviction, in a trial by jury, for violations of Sec. 145 (b) of Title 26 of the U. S. Code.

QUESTION PRESENTED

The question presented by the opinion and record is this:

I.

Whether the grand jury which indicted, and the petit jury which tried and convicted Petitioner, Jack H. Halfen, selected, impaneled and sworn pursuant to a plan, system and procedure fixed under the provisions of Article 2133, Vernon's Annotated Statutes of the State of Texas, enacted pursuant to the provisions of Article 16, Section 19, of the Constitution of the State of Texas, which expressly limits grand jury and petit jury service to men only, and expressly and impliedly excludes and prohibits women from serving on grand and petit juries, constituted a denial to Petitioner, Jack H. Halfen, of a fair and imparital jury trial as guaranteed to him by the 6th Amendment to the Constitution of the United States.

II.

CONSTITUTIONAL PROVISION, STATUTE AND FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Article 16, Section 19 of the Texas Constitution provides:

> "The legislature shall prescribe by law the qualification of grand and petit jurors."

Article 2133, Vernon's Annotated Civil Statutes of Texas provides:

"All men over twenty-one years of age are competent jurors unless disqualified under some provision of this chapter. No man shall be qualified to serve as a juror who does not possess the following qualifications: ***."

Rule 12(b) (2), F R. Crim. P., provides:

"Defenses and Objections Which Must be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

III.

Petitioner, timely but unsuccessfully, challenged the composition of the grand jury which indicted him (R. 4-7), and the petit jury which tried and convicted him (R. 7-9), because, under the Constitution and Statutes of Texas, women were excluded from jury service.

IV.

REASONS FOR GRANTING THE WRIT

Petitioner contends that, under the decision of the United States Supreme Court in the case of **Ballard v. United States**, 329 U.S. 186, 91 L. Ed. 181, the grand jury which indicted and the petit jury which tried Petitioner were unlawfully selected, impaneled and sworn in that same were selected, impaneled and sworn pursuant to a Texas

constitutional and statutory provision which excludes and prohibits women from jury service; and, by reason thereof, Petitioner was denied a fair and impartial trial, as guaranteed to him by the 6th Amendment to the Constitution of the United States, and deprived him of due process of law, contrary to the 5th Amendment to the Constitution of the United States. This Court, in the case of **Ballard v. United States,** held that the systematic exclusion of women from jury service in California violated the 5th and 6th amendments to the Constitution of the United States.

The basis for the decision in the **Ballard** case holding that the all male jury therein was illegally constituted was the "purposeful and systematic exclusion of women from the jury panel." 329 U.S. at pp. 193, 195. As we view the broad language of this court in that case, it would appear that the same violence to the 5th and 6th Amendments to the Constitution of the United States was committed by the constitutional and statutory provisions of Texas as was done by the conduct of the court officials as in the **Ballard** case, supra.

The court below based its opinion on authority of the case of **Hanratty v. United States,** 218 Federal Reporter, 2d Series, 358. However, in that case objection to the composition of the jury was not timely made and came after the verdict of the jury by motion in arrest of judgment. Here, in the present case, the objection to exclusion of women from the grand and petit juries, was made by motion to quash the indictment and by challenge to the array of the petit jury panel (Rule 12 (b) (2) F. R. Crim, P.). The meaning of the decision in the **Ballard** case, as we conceive it, is that Congress contemplated that a jury would be made from a cross section of the community, and truly representative of it, and if women are excluded from the

jury, then only one-half of the community would be called for jury service; and that is a departure from the statutory scheme of jury selection which Congress adopted, and that the Court should exercise its power of supervision over the administration of justice in Federal courts to correct an error which permeated the proceeding. We feel that the opinion of the court below is in conflict with the decision of this Court in the **Ballard** case, supra, and that it is important to Petitioner as well as to the jurisprudence of the nation to have the decision in the **Ballard** case clarified and its scope defined, and the rule therein defined and applied in this case.

V.

WHEREFORE, Petitioner, Jack H. Halfen, prays that his petition for a Writ of Certiorari from this Court to the Court of Appeals for the Fifth Circuit be granted.

DATED June 3, 1955.

JOHN PEACE
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San Antonio, Texas

HERBERT OLIVER
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San Antonio, Texas

POLK SHELTON
Captl. Natl. Bank Bldg.
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By _____
Attorneys for Petitioner

APPENDIX

Opinion of the Court—Filed March 30th, 1955

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 15180

JACK H. HALFEN, APPELLANT,

versus

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court for the Western District of Texas.

(Mar 30 1955)

Before HOLMES and RIVES, Circuit Judges, and THOMAS, District Judge.

PER CURIAM:

The judgment appealed from is affirmed upon the authority of Hanratty v. U.S., 218 F (2) 358, decided by this court on January 25, 1955.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 126

JACK H. HALFEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. 6) affirming the judgment ot the District Court is reported at 220 F. 2d 440.

JURISDICTION

The judgment of the Court of Appeals was entered on March 30, 1955, and a petition for rehearing was denied on May 9, 1955. (R. 26, 31.) The petition for certiorari was filed on June 6, 1955.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether the indictment against petitioner was invalid and his conviction after trial vitiated because pursuant to Texas law women were excluded from service on the grand and petit juries.

STATUTES AND OTHER AUTHORITY INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

Constitution of Texas:

Article XVI

* * * * *

Sec. 19. The legislature shall prescribe by law the qualification of grand and petit jurors.

Vernon's Annotated Civil Statutes of Texas:

Art. 2133. *Qualifications*

All men over twenty-one years of age are competent jurors, unless disqualified under some provision of this chapter. No man shall be qualified to serve as a juror who does not possess the following qualifications: * * *

STATEMENT

On April 6, 1954, a three count indictment was returned against petitioner in the United States District Court for the Western District of Texas charging him with wilful attempted evasion of his and his wife's separate income taxes for the year 1947, computed on a community property basis, and their joint income taxes for 1948, in violation of Section 145(b), Internal Revenue Code of 1939. (R. 1-4.)

Petitioner filed a pretrial motion to quash and dismiss the indictment (R. 4) charging that the grand jury which returned the indictment was not drawn, selected or summoned in accordance with law because women were intentionally and systematically excluded from the grand jury panel under a procedure adopted pursuant to Article XVI, Section 19, of the Texas Constitution and Article 2133

of the Revised Civil Statutes of Texas, thereby denying him due process of law (R. 5-6). The motion was denied. (R. 6-7.)

Then, in language practically identical to that used in his motion to quash the indictment, petitioner challenged the array of the petit jury by motion made before its empaneling. (R. 7.) He renewed his argument that he had been denied due process of law because women were excluded from the petit jury panel (R. 8), and moved for its dismissal (R. 9). This motion was also overruled. (R. 9.)

On June 24, 1954, the jury returned a verdict of guilty as to all three counts (R. 14) and on July 8, 1954, petitioner was sentenced to four years imprisonment on each count, the sentences to run concurrently, and fined $5,000 on each count, a total of $15,000. (R. 17.) The conviction was affirmed by the Court of Appeals. (Pet. 6.)

ARGUMENT

Petitioner contends (Pet. 3-5) that he was denied a fair and impartial jury trial because pursuant to Texas law women were excluded from the grand jury that indicted him and from the petit jury that convicted him. To support his position petitioner relies on this Court's decision in *Ballard* v. *United States,* 329 U. S. 187. (Pet. 3-4). He misconstrues that decision, however. There is no constitutional rule or policy requiring women to be placed on jury lists. See *Glasser* v. *United States,* 315 U. S. 60, 65; *Ballard* v. *United States,* 329 U. S. 187, 199, 204

(dissenting opinions). The basis for the decision in *Ballard* holding that the all male jury therein was illegally constituted was "the purposeful and systematic exclusion of women from the panel" in a state (California) that specifically made women eligible for jury service. It was this "departure from the statutory scheme" that was condemned. (329 U.S., at pp. 193, 195.) No such departure from the statutory scheme is involved here. On the contrary, the statute governing the selection of juries in Texas limited the lists to men.* Art. 2133, Vernon's Annotated Civil Statutes of Texas, *supra,* p. 3. It is generally established that such exclusions from grand and petit juries do not deprive defendants of any procedural right either under the statute or the constitution. *Quinones* v. *United States,* 161 F.2d 79 (C.A. 1st), certiorari denied, 331 U.S. 833; *Johnson* v. *Sanford,* 167 F.2d 738 (C.A. 5th); *Martin* v. *United States,* 166 F.2d 76 (C.A. 4th).

In *Hanratty* v. *United States,* 218 F. 2d 358 (C. A. 5th), certiorari denied, May 17, 1955, No. 675, 1954 Term, also a federal prosecution brought in Texas, the Court of Appeals held the identical contention made by petitioner herein to be "utterly without substance" (218 F. 2d, at p. 359). The court below relied on *Hanratty* in the present case. Peti-

* To a degree, state law is determinative of the qualifications of federal jurors. By 28 U.S.C., Sec. 1861, Congress provided that citizens of the United States over 21 years of age can serve as federal jurors unless "incompetent to serve as a grand or petit juror by the law of the State in which the district court is held."

tioner attempts to distinguish *Hanratty* on the ground that there the objection to the composition of the jury panel was not timely raised as it was in the instant case. But the *Hanratty* opinion makes it clear that the court also disposed of the contention on the merits.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
JOHN H. MITCHELL,
JOSEPH M. HOWARD,
DAVID R. URDAN,
Special Assistants to the Attorney General.

JULY, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 349741 1955

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 126

JACK H. HALFEN, [redacted],

v.

UNITED STATES OF AMERICA, [redacted]

Appeal from the United States District Court for the Western District of Texas, Austin Division

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MOTION FOR REHEARING

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, in the above styled cause, files this his motion for rehearing and says:

This motion for rehearing should be granted because of the importance of the federal law involved. Petitioner verily believes that, since this appeal was perfected, as provided by the rules, intervening circumstances of substantial and controlling effect have occurred in this: That this case was affirmed by the United States Court of Appeals for the Fifth Circuit on the authority of **Hanratty v. United States,** 218 F. 2d 358, decided by the Court on the 25th day of January, 1955; and the authority for **Hanratty**

v. United States was, among others, **Glover v. Cobb et al**, 123 S.W. 2d 794 w.e.r.

Since the case at bar was tried and appealed, the people of the State of Texas amended the Texas Constitution. Such action occurred on November 2, 1954. This action was taken by the people of Texas in response to the need for same as shown by the **Glover case**, the **Hanratty case** and the case of **Ballard v. United States**, 329 U.S. 186; 91 L. Ed. 181.

The provision of the Constitution of Texas in question, at the time this case was tried, reads as follows:

> "The legislature shall prescribe by law the qualification of grand and petit jurors." Art. 16, Sec. 19, Texas Constitution.

Article 2133, Vernon's Annotated Civil Statutes of Texas provides:

> "All men over twenty-one years of age are competent jurors unless disqualified under some provision of this chapter."

The constitutional provision now reads, since its amendment on November 2, 1954, as follows:

> "Sec. 19. The legislature shall prescribe by law the qualifications of grand and petit jurors; provided that neither the right nor the duty to serve on grand and petit juries shall be denied or abridged by reason of sex. Whenever in the Constitution the term "men" is used in reference to grand or petit juries, such term shall include persons of the female as well as the male sex."

Prior to the amendment above mentioned, Texas was one of six states—Alabama, Georgia, Mississippi, South

Carolina and West Virginia being the others, which neither required or permitted women to serve on juries. By this amendment, the law of Texas was brought up-to-date with this Court's statement in the Ballard case. It will be observed that all the six states, except West Virginia and South Carolina are within the territory of the Fifth Circuit.

This case, unlike the **Hanratty v. United States, supra,** case, admits of no waiver by petitioner, because he presented his question timely and the question was squarely raised in the trial court. The question here is not merely a procedural one but, as the Court said in the **Ballard Case,**

> "Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

Petitioner's right to the kind of jury declared for in the Ballard case, and now provided for by the constitutional amendment voted by the people of Texas on November 2, 1954, was a substantial rather than a mere procedural one and to deny this right to petitioner was condemned by this Honorable Court in the **Ballard case** in these words:

> "It is an administrative denial of a right which the law-makers have not seen fit to withhold from but have actually guaranteed to him."

We feel this right was guaranteed to petitioner irrespective of the constitutional amendment of Texas and brings the petitioner's case squarely under the doctrine of the **Ballard case,** and the decision of the lower court is in conflict with the decision of this court in the **Ballard case.**

WHEREFORE, petitioner prays as he has heretofore in his petition for Writ of Certiorari.

Petitioner certifies, by counsel whose name is signed and subscribed, that this motion for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds hereinabove set out.

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POLK SHELTON,
Austin, Texas,

JOHN PEACE,
Majestic Bldg.,
San Antonio, Texas.

By .....
Attorneys for Petitioner

A copy of the above and foregoing Motion for Rehearing has been furnished to Russell B. Wine, United States Attorney, Federal Building, San Antonio, Texas, attorney for Appellee.

.....
Of Counsel for Appellant